100TH CONGRESS
2d Session

SENATE

EXEC. REPT.
100-32

INVESTMENT TREATIES WITH SENEGAL, ZAIRE, MOROCCO, TURKEY, CAMEROON, BANGLADESH, EGYPT, AND GRENADA

OCTOBER 4 (legislative day, SEPTEMBER 26), 1988.—Ordered to be printed

---

Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Docs. 99-15, 99-17, 99-18, 99-19, 99-22, 99-23, 99-24, and 99-25]

The Committee on Foreign Relations, to which was referred the Treaty between the United States of America and the Republic of Senegal concerning the reciprocal encouragement and protection of investment, with protocol, signed at Washington, December 6, 1983; the Treaty between the United States of America and the Republic of Zaire concerning the reciprocal encouragement and protection of investment, with protocol, signed at Washington, August 3, 1984; the Treaty between the United States of America and the Kingdom of Morocco concerning the encouragement and reciprocal protection of investments, with protocol, signed at Washington, July 22, 1985; the Treaty between the United States of America and the Republic of Turkey concerning the reciprocal encouragement and protection of investments, with protocol, signed at Washington, December 3, 1985; the Treaty between the United States of America and the Republic of Cameroon concerning the reciprocal encouragement and protection of investment, signed at Washington, February 26, 1985; the Treaty between the United States of America and the People's Republic of Bangladesh concerning the reciprocal encouragement and protection of investment, with protocol and exchange of letters, signed at Washington, March 12, 1986; the Treaty between the United States of America and the Arab Republic of Egypt concerning the reciprocal encouragement and protection of investments, signed at Washington, September 29, 1982, with a related exchange of letters signed March 11, 1985; and a supplementary protocol signed March 11, 1986; and the Treaty between the United States of America and Grenada concerning the reciprocal

S384-18

encouragement and protection of investment, signed at Washington, May 2, 1986; having considered the same, reports favorably thereon with an identical understanding to each and recommends that the Senate gives its advice and consent to ratification thereof.

PURPOSE

The principal purpose of the bilateral investment treaties is to encourage and protect U.S. investment in developing countries.

MAJOR PROVISIONS

The major provisions contained in each of the eight bilateral investment treaties are as follows:

—The better of either national or most-favored nation treatment, for each party to the treaty, thereby providing in the case of U.S. companies a "level playing field" in competing with national and third-world investors;

—International law standards for expropriation and for payment of prompt and fair compensation;

—Guaranteed access to foreign exchange and the right to repatriate capital except under emergency situations; and

—Access to international arbitration for settlement of investment disputes.

BACKGROUND

The earliest formal economic treaties that the United States negotiated with other countries were a series of Friendship, Commerce, and Navigation (FCN) treaties. These treaties set the framework for U.S. trade and investment relations with foreign countries.

With the advent of the General Agreement on Tariffs and Trade (GATT) in 1948, U.S. trade relations began to be set with foreign countries through multilateral trade agreements and the use of FCN treaties faded; the last two FCN's were negotiated in the late 1960's. However, this multilateral approach left a gap in relations with foreign countries involving U.S. investment abroad, since investment matters are currently outside the scope of GATT. However, the United States has included investment issues in the ongoing Uruguay trade negotiations.

In an attempt to promote the free flow of investment internationally, in the absence of multilaterally agreed to rules, the United States began, in 1981, to negotiate a new series of treaties called Bilateral Investment Treaties (BIT's). The BIT's are therefore the modern successor on the investment side to the Friendship, Commerce, and Navigation Treaty series. The 10 BIT's submitted here for advice and consent to ratification are the first in the new series.

COMMITTEE ACTION

On March 25, 1986, the President transmitted the following bilateral investment treaties to the Senate for advice and consent to ratification: Panama (Treaty Doc. 99–14), Senegal (Treaty Doc. 99–15), Haiti (Treaty Doc. 99–16), Zaire (Treaty Doc. 99–17), Morocco

(Treaty Doc. 99–18), and Turkey (Treaty Doc. 99–19). On June 2, 1986, the President transmitted to the Senate four additional bilateral investment treaties with the following countries: Cameroon (Treaty Doc. 99–22), Bangladesh (Treaty Doc. 99–23), Egypt (Treaty Doc. 99–24), and Grenada. These treaties were referred to the committee on Foreign Relations for consideration. On August 11, 1986 the committee held a public hearing on the pending treaties. No other action was taken in the 99th Congress.

On August 9, 1988, the committee held a second hearing on the pending treaties, receiving testimony from Assistant Secretary of State for Economic and Business Affairs Eugene McAllister. On September 14, 1988, the committee ordered reported the following treaties favorably, by voice vote, subject to an identical Understanding: Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada.

The committee deferred action on the treaties with Panama and Haiti.

Entry Into Force

Each treaty will enter into force 30 days after the date of exchange of instruments of ratification, remain in force for a period of 10 years, and continue in force after that period, until such time as either party gives one year's written notice of its intention to terminate at the end of the tenth year, or any time thereafter. Upon termination of the treaty, all of the provisions of the treaty, except for the entry into force provision, continue in effect for an additional 10 years with respect to any investments which have been made or acquired prior to the date of termination.

Committee Comments

The committee is fully supportive of the goals and objectives of the Administration in negotiating these bilateral investment treaties. However, the committee wished to emphasize to the other parties to the treaties that U.S. national security interests, as determined by the President, would take precedence over provisions of the treaties, should that become necessary. For that reason, the committee chose to attach an identical understanding to each resolution of ratification clearly stating the Senate's interpretation of Article X of each treaty (Article IX in the case of Morocco) as encompassing that right.

In addition, the committee would have preferred all of the treaties to have contained a provision prohibiting the imposition of performance requirements on prospective investors which require or enforce commitments to export goods produced, or which specify goods or services must be purchased locally, or which impose any other preconditions on such investors. (The treaties with Senegal, Cameroon, and Grenada do include such a prohibition.) The committee believes that performance requirements have become a growing problem for U.S. investors abroad. Moreover, in certain circumstances they have negative implications on the U.S. trade deficit, and on U.S. competitiveness generally. The committee would urge the Administration to work to include this prohibition in future treaties.

Framework of the Bilateral Investment Treaty Program

Before setting out to negotiate individual bilateral treaties, the Administration first crafted a so-called "model treaty" after consulting closely with the international legal and business community.

The model treaty sought to incorporate provisions which would facilitate the free flow of investment, prohibit practices which have emerged in various countries which inhibit that free flow, and generally codify rules on investment and dispute settlement, which the U.S. views as well established international law and precedent. Specifically, the model treaty seeks to achieve the following objectives:

—foreign investments are to be accorded treatment in accordance with international law and are to be treated no less favorably than investments of the host country or no less favorably than investments of third countries, whichever is the most favorable treatment, ("national" or "most-favored-nation" treatment) subject to certain specified exceptions;

—international law standards shall apply to the expropriation of investment and to the payment of compensation for expropriation;

—free transfers shall be afforded to funds associated with an investment into and out of the host country; and

—procedures are to be established which allow an investor to take a dispute with a Party directly to binding third-party arbitration.

Major Differences

Features of the Treaties

This model in large measure encapsules what the United States perceives as international law in the area. However, with the exception of the treaty with Grenada, all of the treaties deviate somewhat, from the model treaty. Below is a brief description of each treaty's major deviations from the model.

Senegal

(a) *Employment.*—A provision in the treaty makes clear that freedom of employment does not necessarily confer right of entry of any person into the country in which the investment is taking place.

(b) *National or Most Favored Nations Treatment.*—With very limited exceptions, the United States treats all investment alike whatever its source, and thus accords "national" treatment to most foreign investment. The United States has sought to ensure that other countries similarly grant "national" treatment to U.S. investments. At the very least, the United States seeks to ensure that no investor from a third country is treated more favorably by a host government than a U.S. investor, so-called "most favored nation" treatment. For a variety of reasons, many countries, particularly developing countries, discriminate in their treatment of foreign investments. The model treaty attempts to limit this discrimination

by providing for only limited exceptions from "national" treatment.

As provided in the annex to the treaty, Senegal exempts portions of its economy from national treatment with respect to U.S. investments. However, the sectors are not explicitly listed. Rather the annex states the following areas will be exempt: "small and medium-sized enterprises specified in Law 81-51 July 26, 1981."

Zaire

(a) *Performance Requirements.*—The model seeks to prohibit the imposition of any requirements being placed on a potential investor as a precondition for receiving authority by a host country to make an investment. Over the past 10 years, a rising list of so-called "performance requirements" have come to be a serious impediment to investment and trade flows. These requirements include such matters as local procurement and employment mandates as well as exporting requirements. U.S. officials have attempted to eliminate such practices, and have sought to include this problem on the agenda of the ongoing trade negotiations.

The treaty with Zaire contains no such prohibition.

(b) *Free Transfers.*—The model treaty seeks to provide for the unimpeded transfer of funds due on returns from investments, royalties, loan repayments, liquidations, and compensation payments. Because Zaire has a severe foreign exchange shortage, it rejected the model transfer provision. The transfer provision finally agreed to will permit Zaire to delay transfers on the proceeds of liquidations of investments for up to three years, and gives it discretion to choose the type of convertible currency in which the transfer will be made. In addition, under the terms of the treaty, Zaire may delay implementing this provision for up to 3 years after the treaty enters into force.

(c) *National or Most Favored Nations Treatment.*—The treaty with Zaire would exempt the following sectors, among others, from national treatment with respect to foreign investment: transportation infrastructure projects, and health and education infrastructure projects.

Morocco

(a) *National Treatment.*—U.S. investments in Morocco will only be granted national treatment on establishment of the investment. When an investor is seeking to make an investment he will be accorded the same treatment as other foreign investors, that is "most favored nation" treatment.

(b) *Performance Requirements.*—The treaty does not prohibit the imposition of performance requirements.

(c) *Reinvested Profits.*—This treaty provides that for the Moroccan side, reinvested profits are subject to administrative approval before the investment may occur.

(d) *Dispute Settlement.*—The treaty requires that parties in investment disputes in Morocco first seek local remedies either judicial or administrative. However, after a specified time period, a U.S. investor may turn the dispute over to international arbitration.

Turkey

(a) *National Treatment.*—This provision is the same as one contained in the Morocco treaty in differentiating between treatment of established investment verses prospective investment. Turkey has exempted the following sectors, among others, from national treatment; tobacco, spirits and alcoholic beverages, and unicorporated retailing and service operations.

(b) *Performance Requirements.*—The treaty does not prohibit the imposition of performance requirements.

(c) *Expropriation.*—The treaty provides that payment of interest in the case of delayed compensation for expropriations shall be at the rate equal to the government borrowing rate, rather than the more usual "commercially reasonable rates".

(d) *Transfers.*—The treaty provides for limited exceptions to the free transfer of funds "in exceptional financial circumstances relating to foreign exchange." However, such delays may not exceed three years.

Cameroon

(a) *Expropriation.*—Payments of interest as compensation for expropriation shall be at rates equivalent to "current international rates."

(b) *Transfers.*—Transfers are generally to be free and without delay. However, the treaty permits the Government of Cameroon discretion in terms of the choice of convertible currency in which to make payment.

(c) *Compensation of Damages.*—The treaty contains a provision exempting the country from compensation of damages when such damages are owned to nationals or companies responsible for damage to their own investment.

Bangladesh

(a) *Transfers.*—The treaty contains a weaker provision than the model treaty concerning the right of investors to hire freely, without regard to nationality.

(b) *Employment.*—The treaty contains a weaker provision than the model treaty concerning the right of investors to hire freely, without regard to nationality.

(c) *Performance Requirements.*—The treaty does not prohibit the imposition of performance requirements.

(d) *Losses from War Damages.*—The treaty specifically excludes from its coverage any claims for damages related to the 1971 war for independence.

Egypt

(a) *Definition of Investment.*—The definition of investment contained in this treaty differs from the model in that it defines control of an investment as "having a substantial share of ownership rights and the ability to exercise decisive influence." However, the treaty provides for binding dispute settlement in case of disagreements.

(b) *National Treatment.*—The list of sectors excluded from national treatment by Egypt is extensive, including "commercial ac-

tivity such as distribution, wholesaling, retailing, import and export activities." In addition, the treaty does not fully provide for national treatment for activities associated with an investment, such as purchasing necessary foreign exchange.

(c) *Employment.*—This treaty permits investors freedom to hire "the managing director of their choice" without regard to nationality. This is far more restrictive than the model or any other treaties currently before the Committee.

(d) *Performance Requirements.*—As with other treaties, this treaty does not prohibit the imposition of performance requirements.

(e) *Transfers.*—The treaty deviates significantly from the model's provision of free and expeditious transfer of funds. It prohibits investors from repatriating or disposing of investment capital for five years from the time it is imported. It also permits Egypt to delay transfers in cases of foreign exchange shortages.

Description of Treaties Provisions

PREAMBLE

The preamble describes the broad goals each party wishes to achieve in entering into these treaties.

Article I—Definitions

Article I defines the terms used elsewhere in the treaties.

Article II—Encouragement and Promotion of Investments

Article II describes the obligations of each party with respect to the treatment of investors of the other party.

Article III—Compensation for Expropriation

Article III prohibits the expropriation or nationalization of investments owned by nationals of the other party, except for a public purpose and in accordance with due process of law. It also provides for prompt, adequate and effective compensation for expropriations which legally take place.

Article IV—Compensation for Damages Due to War and Similar Events

Article IV specifies the treatment each party will accord to the investments owned by nationals of the other party, in cases of damages to such investments from war, revolution, state of national emergency, revolt, or other such acts.

(This provision is not included in the treaties with Morocco, Turkey, or Grenada.)

Article V—Transfers

Article V defines the obligations of each party with respect to permitting free transfers of funds related to investments.

(This provision appears as Article IV in the treaties with Morocco, Turkey, and Grenada.)

Article VI—Consultations and Exchange of Information

Article VI establishes a mechanism for either party to request consultations concerning the interpretation or application of the treaties and to resolve any disputes related thereto. It also commits each party to supply information on investments within its territory by investors who are nationals of the other party, subject to applicable laws and regulations in each country, and "with due regard for business confidentiality".

(This provision appears as Article V in the treaties with Morocco, Turkey, and Grenada.)

Article VII—Settlement of Legal Investment Disputes Between One Party and a National or Company of the Other Party

Article VII defines the meaning of investment disputes for purposes of the treaties. It also outlines procedures for settlement of investment disputes, including settlement by conciliation or binding arbitration.

(This provision appears as Article VI in the treaties with Morocco, Turkey, and Grenada.)

Article VIII—Settlement of Disputes Between the Parties Concerning Interpretation or Application of the Treaties

Article VIII establishes the procedures for settlement of disputes concerning the interpretation and application of provisions of the treaties between treaty parties.

(This provision appears as Article VII in the treaties with Morocco, Turkey, and Grenada.)

The treaties with Turkey and Grenada contain a different Article XIII which specifically exempts issues related to the U.S. Export Import Bank and other official credits, guarantees and insurance from the application of Articles VI and VII of those treaties.

Article IX—Preservation of Rights

Articles IX preserves the laws, regulations and administrative practices and procedures of both parties, notwithstanding the treaty.

(This provision appears as Article VIII in the treaty with Morocco.)

Article X—Measures not Precluded by the Treaties

Article X reserves the right of each party to take all measures necessary for the maintenance of public order, fulfillment of its existing international obligations and protection of its own security interests.

The committee's action with respect to the Understanding it attached to each resolution of ratification clarifies and highlights the importance of this article. It clearly enunciates the right this article accords to the United States, to take whatever steps deemed necessary by the President for national security reasons, notwithstanding any other provisions of the treaties.

(This provision appears as Article IX in the treaty with Morocco.)

Article XI—Taxation

Article XI limits the scope of the treaties with respect to taxation matters.

(This provision is not included in the treaty with Morocco.)

Article XII—Application of Treaties to Political or Administrative Subdivisions of the Parties

Article XII provides for the application of the treaties to treaty parties' political or administrative subdivisions.

(This article is not included in the treaties with Morocco, Turkey, or Grenada.)

Article XIII—Entry into Force and Duration and Termination

Article XIII provides for the entry into force of the treaties 30 days after the exchange of instruments of ratification; for them to remain in force for ten years before either party can terminate; and for investments undertaken prior to termination to be afforded protections equivalent to the treaties' protections for additional 10 years.

(This provision appears as Article X in the treaty with Morocco; and article XII in the treaties with Turkey and Grenada.)

The treaty with Senegal also provides for either party to amend the treaty with the agreement of the other party. The committee expects that any such amendment would be submitted to the Senate for advice and consent to ratification, before the United States "agreed" to any such amendment.

ANNEX

The annex provides, in accordance with Article II, paragraph 3 of the treaties, the sectors which each party exempts or limits from national treatment with respect to investments of the other party.

(This is done by protocol in the treaties with Turkey and Morocco.)

PROTOCOLS

The protocols to the treaties further elaborate on specific interpretations with respect to various provisions on individual treaties.

Resolutions of Ratification

SENEGAL

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, signed at Washington, December 6, 1983, (Treaty Doc. 99–15), provided that the Senate's advice and consent to ratification of the Investment Treaty with Senegal is subject to the following understanding:

Under Article X of the treaty, either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security.

ZAIRE

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, signed at Washington, August 3, 1984, (Treaty Doc. 99–17), provided that the Senate's advice and consent to ratification of the Investment Treaty with Zaire is subject to the following understanding:

Under Article X of the treaty, either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security.

MOROCCO

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments, with Protocol, signed at Washington, July 22, 1985, (Treaty Doc. 99–18), provided that the Senate's advice and consent to ratification of the Investment Treaty with Morocco is subject to the following understanding:

Under Article IX of the treaty, either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security.

TURKEY

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, with Protocol, signed at Washington, December 3, 1985, (Treaty Doc. 99–19), provided that the Senate's advice and consent to ratification of the Investment Treaty with Turkey is subject to the following understanding:

Under Article X of the treaty, either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security.

CAMEROON

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment, signed at Washington, February 26, 1985, (Treaty Doc. 99–22), provided that the Senate's advice and consent to ratification of the Investment Treaty with Cameroon is subject to the following understanding:

Under Article X of the treaty, either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security.

BANGLADESH

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol and Exchange of Letters, signed at Washington, March 12, 1986, (Treaty Doc. 99-23), provided that the Senate's advice and consent to ratification of the Investment Treaty with Bangladesh is subject to the following understanding:

Under Article X of the treaty, either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security.

EGYPT

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, signed at Washington, September 29, 1982; with a Related Exchange of Letters signed March 11, 1985; and a Supplementary Protocol signed March 11, 1986, (Treaty Doc. 99-24), provided that the Senate's advice and consent to ratification of the Investment Treaty with Egypt is subject to the following understanding:

Under Article X of the treaty, either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security.

GRENADA

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and Grenada Concerning the Reciprocal Encouragement and Protection of Investment, signed at Washington on May 2, 1986, (Treaty Doc. 99-25), provided that the Senate's advice and consent to ratification of the Investment Treaty with Grenada is subject to the following understanding:

Under Article X of the treaty, either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national secuirty.

○